United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In The United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 1 1958
Joseph W. Stewart
CLERK

NO. 14,598

121

HAROLD I. MC QUEEN,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Washington, D. C.
EX. 3-3239

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JOINT APPENDIX

139 [Filed March 10, 1958]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled January 2, 1958, Sworn in on January 7, 1958

THE UNITED STATES OF AMERICA	)	Criminal No. 216-'58
vs.	)	Grand Jury No. 135-58
Harold I. McQueen	)	Robbery (22-2901 D.C.Code)

The Grand Jury charges:

On or about January 25, 1958, within the District of Columbia, Harold I. McQueen by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Lee Bong property of Lee Bong of the value of about $29.00 consisting of the following: one wallet of the value of $1.00 and $28.00 in money.

/s/ Oliver Gasch
Attorney of the United States
in and for the District of Columbia

A TRUE BILL:
/s/ R. M. Lawrenson
Foreman.

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140 [Filed March 11, 1958]

ORDER APPOINTING COUNSEL TO DEFEND

Upon consideration of the motion of the defendant in the above-entitled cause, it is this 11th day of March, A.D., 1958,

ORDERED, That William J. Bartle be, and he is, hereby appointed to appear and defend on behalf of the said defendant. (703 Maryland Ave., N.E.)

/s/ David A. Pine,
JUDGE

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141 [Filed March 14, 1958]

PLEA OF DEFENDANT

On this 14th day of March, 1958, the defendant Harold I. McQueen, appearing in proper person and by his attorney William J. Bartle, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of

Present:

DAVID A. PINE

United States Attorney

Presiding Judge
Criminal Court #2

By Joel Blackwell
Assistant United States Attorney

HARRY M. HULL, Clerk

Harry Kaitz, Official Reporter

By /s/ Harold G. Dodd,
Deputy Clerk

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142 [Filed April 4, 1958]

MOTION TO SUPPRESS EVIDENCE

Now comes the defendant herein, and moves this Honorable Court to suppress the evidence herein.

1. That the wallet and contents, the basis of the charge, were not found on defendant, but the wallet was found on the premises of the alleged owner.

2. That the alleged owner, Lee Bong, is now deceased.

3. That the alleged complainant, being now deceased, makes identification of the wallet impossible, for purposes of this action. That any evidence in this matter would be hearsay.

Authority: Smith v. United States, 70 U. S. Appeals 255

"The rule seems to be, while an officer may testify before a jury that, acting upon information he did certain things, he may not go further and testify as to precisely what he was told about the particular place or the particular person."

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/s/ William J. Bartle
Attorney for Defendant
703 Maryland Avenue, N. E.

CERTIFICATE OF SERVICE

That the foregoing motion, Points and Authorities and the Affidavit were delivered, by hand, to the United States Attorney's office this 4th day of April, 1958.

/s/ William J. Bartle

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143 [Filed April 4, 1958]

AFFIDAVIT IN SUPPORT OF MOTION

Harold I. McQueen, being first duly sworn on oath deposes and says:

That I came to Washington, District of Columbia, about December 5, 1957 and lived at 1336 Vermont Avenue, N. W.

That I had been a customer of Lee Bong's restaurant, located at 1504 14th Street, N. W., many times.

That on Friday, January 24, 1958, I arrived at Lee Bong's about 7:30 P.M. where I ate my dinner, including beer. Later in the evening some friends secured a bottle of liquor which was consumed by us in the men's room at Lee Bong's. I fell asleep in a booth and the waitress told me to get some air. Twice during the evening I went outside.

On a subsequent visit to the men's room I fell asleep where Lee Bong found me after closing hours. He was upset about finding me after closing hours and told me to get out. He opened the back door to let me out.

When we were both in the back yard, Lee Bong suddenly drew a pistol and accused me of taking his wallet and then fired two shots at my feet. These shots attracted the two patrolmen who arrested me.

I did not take the wallet. It was not found on me and I do not know anything about it.

/s/ Harold I. McQueen

Subscribed and sworn to before me this 4th day of April, 1958.

/s/ J. E. Ottes, NOTARY PUBLIC

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145 [Filed June 17, 1958]

Let the applicant proceed on appeal without prepayment of costs and be furnished the stenographic transcript of proceedings at the expense of the United States. /s/ EDWARD A. TAMM, Judge.

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150 [Filed June 10, 1958]

JUDGMENT AND COMMITMENT

On this 16th day of May, 1958, came the attorney for the Government and the defendant appeared in person and William J. Bartle, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ROBBERY, as charged, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Two (2) years to Six (6) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVID A. PINE,
United States District Judge.

---

151 [Filed June 17, 1958]

NOTICE OF APPEAL

Name and address of appellant: Harold L. McQueen, District Jail.
Name and address of appellant's attorney: William J. Bartle, 703 Maryland Avenue, N. E., Washington 2, D. C., Offense - Robbery; Concise statement of judgment or order, giving date, and any sentence - May 16, 1958, Sentence: Two to Six Years. Name of Institution where now confined, if not on bail -

District Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

/s/ Harold I. McQueen, Appellant

Date: May 19, 1958

/s/ William J. Bartle,
Attorney for Appellant.

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1 [Filed July 25, 1958]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

vs. : Criminal No. 216-58

HAROLD I. McQUEEN :

Washington, D. C., April 14, 1958

The above-captioned matter came on for trial at 3:20 p.m., before the HONORABLE EDWARD A. TAMM, United States District Judge, and a Jury:

APPEARANCES:

For the United States of America

THOMAS FLANNERY, Assistant U. S. Attorney

For the Defendant

WILLIAM J. BARTLE, ESQ.

* * * * * * * * *

4 THOMAS G. DWYER

* * * * * * * * *

5 DIRECT EXAMINATION

* * * * * * * * *

Q. On January 25, 1958, were you a member of the Metropolitan Police Force? A. Yes, sir.

Q. Were you attached to No. 2 precinct? A. Yes, sir.

Q. Are you presently employed at the White House Police? A. Yes, sir.

Q. Now, then, directing your attention to January 25, 1958, the early morning hours of that day, were you with another police officer? A. Yes, sir, Officer Harned.

Q. Did there come a time when you approached the 1400 block of 14th Street, Northwest? A. Yes, sir.

Q. That is in the District of Columbia, is it not? A. Yes, sir.

Q. And did you approach it for the purpose of pulling a box or making a
6 report to the precinct? A. Yes, sir.

Q. About what time was that? A. Approximately 3:10.

Q. 3:10 a.m.? A. Yes, sir.

Q. Now, then, as you arrived in that vicinity, did something unusual occur? A. Yes, sir.

Q. What happened? A. Well, as we were standing at the box at 14th and P. we heard pistol shots.

Q. Do you recall how many shots you heard? A. I believe there were three pistol shots.

Q. All right. And Officer Harned was with you, was he not? A. Yes, sir, he was.

Q. Upon hearing the shots, what did you and your fellow officer do? A. Well, we immediately rushed to the sound, to where the sounds came from, which was just beyond a gas station on the northwest corner of 14th and P Streets. We climbed part-way up a wall and looked over the wall and observed Lee Bong standing in the back yard of the restaurant, which is at 1504 14th Street, holding a gun.

7 Q. Now, that particular area to which you responded is also in the District of Columbia, is it not? A. Yes, sir.

Q. Did you know Lee Bong? A. Yes, sir, I did.

Q. Who was Lee Bong? A. He was the owner of the restaurant, Lee's Restaurant, at 1504 14th Street.

Q. All right. Now, then, what did you do when you saw what you have stated you saw? A. Well, we had a flashlight in our hands. There was some illumination

coming from the kitchen, as the door was open, and light was coming out the back door, and I had a flashlight, and I shined the flashlight in that direction and I saw Lee and he was shouting that he had been robbed.

Q. Do you recall exactly what he said? A. He said, "You robbed me," "You robbed me."

Q. And what did you do then, or what did you see at that point? A. Well, also at that time I saw the defendant Harold McQueen coming out of a utility shed in the back yard which is used for trash purposes.

8 Q. Do you see McQueen in the courtroom today? A. Yes, sir, I do.

Q. Will you point him out, for the record? A. Sitting right there in the green jacket.

MR. FLANNERY: May the record indicate the witness pointed to the defendant Harold I. McQueen seated at the counsel table?

THE COURT: The record will so indicate.

BY MR. FLANNERY:

Q. What happened next, Officer? A. Well, I then told Mr. Bong to go to the front door and let me in the front door so I could place the defendant under arrest. So I left my partner, Officer Harned, and he held his revolver covering the defendant. I went around to the front door and the complainant didn't show up right away so I knocked on the door quite a bit and came back to the wall and told the complainant the second time. He was very excited and nervous and so after I told him the second time I went back around to the front door and he finally came and let me in and I went to the back door and placed the defendant under arrest.

Q. You say that Lee Bong appeared excited and nervous. Will you tell His Honor and the jury what you noticed about him? A. He was shaking all over.

9 Q. He was shaking? A. Yes, sir, trembling, and his speech was fairly -- like he was nervous and scared.

Q. All right. Now, then, you say you placed the defendant under arrest? A. Yes, sir.

Q. All right. Then what happened after that? A. Then I told my partner, Officer Harned to come around, and Mr. Bong let him in the front door. When he got into the restaurant I gave the defendant to my partner to watch while I went in to the back yard to recover Mr. Bong's wallet that he said was stolen from him.

Q. Did you find the wallet? A. Yes, sir, I did.

Q. Where was that? A. It was just on the outside of the --

MR. BARTLE: If Your Honor please, at this time I would like to object to any introduction of what the officer found in relation to who it belonged to. I believe this is the appropriate time to make that objection.

MR. FLANNERY: Your Honor, I think this testimony is admissible. I
10 can conceive of no theory which would make it inadmissible at this time. Certainly the officer had a legal right to seize the evidence, they had probable cause to believe that a felony had been committed, and to search the immediate area for the proceeds, if any, of the crime.

* * * * * * * * *

(Thereupon the jurors left the courtroom, and counsel for the parties approached the bench, and conferred with the Court as follows:)

THE COURT: What is the basis for your -- is this your motion to suppress that you are making now, Mr. Bartle?

MR. BARTLE: Our position is this, that until the object is identified, which allegedly is the wallet, that there has been no basis for the complaint
11 under the law, and I refer to the law now as the Code Decision Title 22, that after that is identified, ownership and possession, then this other would be proper. Here we only have something the officer found, we don't know whose it is, we are not in a position to ascertain that. There is no one, and I think I am correct here, that can identify the wallet.

MR. FLANNERY: The Government expects to show that the victim told the policemen that it was his wallet and that it is a spontaneous declaration made under the state of stress and strain and shock and is admissible.

THE COURT: I think the only way the Court can evaluate it is to hear the

testimony of the witness out of the presence of the jury and permit you to make whatever argument you want and I will hear you both and pass on it then.

MR. BARTLE: I think that would simplify it altogether.

* * * * * * * * *

12 (Thereupon counsel resumed their places at the counsel table, and the jury not being present in the courtroom, the following proceedings were had:)

BY MR. FLANNERY:

Q. Officer, you had reached the point in your testimony where you said you had recovered a wallet? A. Yes, sir.

THE COURT: The record will indicate, Madam Reporter, that the jury is out of the courtroom at this time. Go ahead.

BY MR. FLANNERY:

Q. Where did you recover the wallet? A. I recovered it alongside of the storage shed in the back yard that I saw the defendant coming out of, in a trash can.

MR. FLANNERY: All right.

THE CLERK: Government Exhibit No. 1 for identification.

(A wallet was marked Government Exhibit No. 1 for identification.)

BY MR. FLANNERY:

Q. Officer, I will show you what is now known for identification, this wallet, and its contents. Can you identify the wallet? A. Yes, sir, I can.

13 Q. How can you identify it? A. By these two little cuts on the edge of the wallet.

MR. FLANNERY: All right.

THE COURT: Keep your voice up so counsel can hear you.

THE WITNESS: By the two cuts on the edge of the corner of the wallet.

MR. FLANNERY: Very well.

BY MR. FLANNERY:

Q. When you recovered that wallet, did it contain something? A. Yes, sir, it did.

Q. What did it contain? A. Twenty-eight dollars in one-dollar bills.

Q. I will ask you to look at the contents of this wallet and tell the number of one-dollar bills. Just count it very quickly. A. Yes, sir.

Q. Twenty-eight dollars? A. Yes, sir.

Q. All right. Now, with respect to the wallet and its contents, Government Exhibit 1 for identification, did you ever discuss the wallet with the defendant in this case, Harold McQueen? A. Yes, sir, I did.

14 Q. And what did the defendant --

THE COURT: The question was, did you discuss the wallet with the defendant.

BY MR. FLANNERY:

Q. When was that? A. After I recovered the wallet.

Q. How soon after the defendant's arrest was it that you discussed the wallet with the defendant? A. Well, immediately I went into the -- after I turned the prisoner over to Officer Harned I went immediately into the shed, looked around, and I recovered the wallet. About a minute later I showed the wallet to the defendant. Then he admitted that he had taken the wallet from the complainant, Lee Bong.

Q. The defendant admitted he had taken the wallet from the complaining witness Lee Bong? A. Yes, sir.

Q. And what did the defendant say to you about what had allegedly happened? A. The defendant said he didn't mean to hurt anyone. He said that he had hidden in the ladies' room with the intention of breaking out of the place and taking whatever he could after the establishment was locked for the night, but when the complainant, Lee Bong, opened the door to the ladies' room he surprised the defendant and the defendant started tussling with him and took his wallet and ran out the back door.

15 Q. Now, what did Lee Bong, the victim, say at that time? A. Mr. Bong told us in the presence of the defendant right after I recovered the wallet that he was in preparation of locking the restaurant for the night and as he always did, he was checking all the doors. As he went to pull the door to the ladies'

room open he was confronted by the defendant who came at him with a beer bottle. In the tussle the defendant bit Lee Bong on the hand and knocked him to the floor, removed his wallet, and ran out the back door.

Q. Did Lee Bong identify the wallet, Government Exhibit 1, as his? A. Yes, sir.

Q. All right. Now, when did Lee Bong die? A. He died at 7:30 in the morning. That is when he was pronounced dead.

Q. That same day? A. Yes, sir.

* * * * * * * * *

16 CROSS EXAMINATION

* * * * * * * * *

17 Q. When Officer Harned had the defendant McQueen in the main part of the building, did you, and did Mr. Bong go with you, back to the rear? A. I don't recall that he went with me.

Q. Then you went back alone to the rear and somewhere in the back you found this alleged pocketbook? A. Yes, sir.

* * * * * * * * *

18 Q. Isn't it a fact that the defendant here denied having attacked Mr. Bong, denied taking the wallet, or taking anything from Mr. Bong? A. The defendant denied taking the wallet before I found it. When I returned he admitted it, and then after Lee Bong had told exactly what had happened, the defendant -- I asked him what happened, in his words, and he said it happened just the way Lee Bong told it.

* * * * * * * * *

19 THE COURT: What is your position, Mr. Bartle?

(Thereupon counsel approached the bench and conferred with the Court as follows:)

MR. BARTLE: Well, my position on this, and I believe I have certain substantiating legal facts to support me on it, is that, first, the wallet has not been sufficiently identified as having been taken by the defendant. Why, the defendant -- I mean the decedent, or Lee Bong -- could have misplaced it there,

he could have lost it. We don't have the complainant here to identify this object, we don't have him here for purposes of cross examination. The mere fact that the officers testify to this is not, and I believe I am correct according to decisions, conclusive that these are the facts, and I believe that it would be unduly unfair to the defendant to convict based on the testimony only of two officers, and I don't mean to impute that they are unworthy or anything, or in fact on two witnesses who were not present when any of this took place, and I believe I am supported in my position by the Opper case, which is probably the latest, at least the most cited, and what were the facts in those cases?

* * * * * * * * *

Q. How soon was the defendant taken to the precinct? A. How soon after the arrest?

Q. That's correct. A. I would say approximately ten minutes, while waiting for a wagon.

Q. Did he make any further statements at the precinct? A. At the precinct he stated that it happened just like Lee had told us.

* * * * * * * * *

Q. In other words, your testimony is that you are telling the Court exactly the way he told you? A. Yes, sir.

* * * * * * * * *

ARGUMENT ON MOTION

MR. BARTLE: Now, the basis of the motion is as stated to this Court, that the wallet in question was found on the premises of the complainant who we do not have the privilege of cross-examining here in Court, or the opportunity to ascertain his demeanor in the chair.

Now, let's be practical about this: The wallet was found on the premises of the complainant. It could have been dropped by the complainant, it could have been dropped by anyone else, other employees. Remember, now, this was after closing.

We do not know nor can we ascertain the time element. Did he lose it before closing or after? We have the testimony only of the officers. We don't know. We were not there.

Now, actually, based on the testimony and the law, Title 22, there is ever a question whether there was a robbery.

We do not deny on behalf of the defendant that he was on the premises, but he has a reasonable excuse for being there. He had been there all evening, which he will testify to. Our position seems to be justified by the Smith versus
26 United States in 70 Appeals D. C. The rule seems to be while an officer may testify before a jury that acting upon information which he did hear, he acted on the information of his hearing, he came to these shots, he did certain things. That we do not dispute, what he did. But he may not go further and testify as to precisely what he was told about the particular place or the particular person. That is on page 256 of Smith versus United States.

Now, that was a numbers case. I don't think it warrants going into that too far; and going a step further now, the objection to the testimony in relation to what the defendant said and Lee Bong said:

If we go back to Forte versus United States --

But first we will read Title 22, Section 2901, which is robbery:

"Whoever, by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another, anything of value" --

The complainant is not here to actually say that anything was taken from his person. The defendant is not charged with grand larceny, he is charged with robbery.

27 In Corpus Juris, the prosecution has the burden of proving a crime has been committed. That cannot be proven in this case, and I use the words "can not" because the party who was allegedly robbed is not present.

Then we go a step further, Forte versus United States, and later we will come to Opper versus United States.

What did Forte say?

There can be no conviction of an accused in a criminal case upon uncorroborated confession, and the further rule represented by the weight of authority and the better view in the Federal Courts, that such corroboration is not sufficient if it tends merely to support the confession without also embracing

substantial evidence of the corpus delicti and the whole thereof.

The law is settled that the corpus delicti includes not only the body or fact of the wrong, in the sense of a death in homicide, or in the loss of a chattel in larceny, but also the criminal means by which the same came about, and we go to Footnote No. 5 in that same case, page 113:

"In the United States, the prisoner's confession when a corpus delicti is not otherwise proven has been held insufficient for his conviction."

And this opinion certainly accords with the humanity of the Criminal Code and with great degree, of course, applied in receiving and weighing the evidence
28 of confessions and other cases, and it seems countenanced by approved writers of this branch of the law.

We also go to Opper versus United States.

THE COURT: What is the name of the case?

MR. BARTLE: O-P-P-E-R (spelling).

Now, in this case, there was extraneous evidence which was admitted and that evidence consisted of (1) specificiations, (2), checks, and (3), verified telephone calls -- three independent sources of evidence.

The court held that this specification which the defendant had caused to be changed in his favor was admitted as a confession of that fact.

But here it is different. We have quite an unusual situation. There is nothing to bottom these alleged confessions on, and if you have nothing to bottom them on, obviously they cannot be admitted.

It is Petitioner's contention that where extra-judicial admissions that point to guilt are made by the accused after the date of the acts charged as crime, testimony by witnesses other than the accused as to such oral or written admissions cannot be accepted as evidence without corroboration of the fact stated.

We cannot have corroboration here due to absence -- absence of the complainant.

29 That conclusion derived from Petitioner's position that admission of essential facts to prove a crime or admission of some of its elements are so

analagous to confessions of guilt that the same rule as corroboration should be applied.

I would like further to call your attention to one other case. It is true that it came out of the Municipal Court of Appeals, rather recently, McGilton versus the United States. The evidence in this case is quite parallel to what we have in the present McQueen case. The detectives also testified that both defendants at the time of their arrest admitted they had stolen the merchandise from Woodward & Lothrop's and were trying to sell it on the street for purposes of buying wine.

Now, what did the Court of Appeals say?

(1), that there was no notice that Woodward & Lothrop had missed anything. In other words, there had been no report of anything having been stolen.

(2), they actually found this merchandise on the party, that is, McGilton, it was under his coat. He was arrested on a street car about a block and a half from Woodward & Lothrop's. I quote:

"This evidence standing alone was insufficient to establish the corpus
30 delicti."

That is, that the crime charged had in fact been committed by someone.

Our question is whether the extra-judicial admission of appellant when coupled with independent evidence forms a sufficient basis for finding of guilt beyond a reasonable doubt.

We have construed that Opper and Smith case to require that where an element of the corpus delicti is supplied by an admission alone, the prosecution must prove substantial independent evidence to show the trustworthiness of that admission.

But we have also construed those cases to require substantial independent evidence that the crime was committed, and I submit on the facts as testified to by the police officer, and the citations which have been read to this Court, that our position is justified in having this evidence excluded.

THE COURT: It is the Court's recollection the last-cited case from which you quoted, that the appeal related to only one of the two defendants, that the

first defendant did not appeal in the case. It is further the Court's recollection that this defendant when apprehended had under his coat or jacket an additional jacket bearing the label "McGregor."

31 MR. BARTLE: That's right.

THE COURT: The store detective testified that the McGregor label jacket was similar to the jackets that were sold in Woodward & Lothrop's by the witness' personal knowledge, but that he could not identify this as being a McGregor jacket which was actually sold in Woodward & Lothrop's or handled in Woodward & Lothrop's.

Aren't those substantially the facts in the case which you cite?

MR. BARTLE: That's correct, but the initial decision was based on the testimony of the detectives, and the admissions made by the defendant at that time and in that respect they are entirely similar to this situation.

* * * * * * * * *

MR. FLANNERY: Counsel's first point, Your Honor, that the wallet has not been sufficiently identified, must fall, because we have testimony from the police officer that the defendant admitted stealing this wallet. There is identification of it.

32 THE COURT: I understand, however, that counsel takes the position that the corpus delicti cannot be established by the defendant's admissions and his demand of you is that you prove the commission of the crime by something other than the defendant's statement.

MR. FLANNERY: Counsel has misconstrued the law. That is my contention. He cites the Forte case, which is no longer the law in the District of Columbia. The ruling in Forte has been modified.

THE COURT: By what?

MR. FLANNERY: By a recent decision of the Supreme Court of the United States in Opper, 348 U. S., page 84.

Reference is made in the Opper case to the Forte case, and Mr. Justice Douglas dissents and he says he believes that Forte versus United States, 68 App. D. C. 111 states the better rule on corroboration. He dissented, but

the majority of the Court didn't agree with him.

Now, the pertinent part of this Opper case, Your Honor, without going into details of this opinion, is this:

The principle of law which they lay down on page 93 of the Opper opinion is this, the Court says:

"However, we think the better rule to be that the corroborative evidence need not be sufficient independent of the statements, to establish the corpus
33 delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense."

Smith versus United States, page 147 of this same volume, is then cited.

"It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

Therefore, it is no longer the law that the Government must prove the corpus delicti independently of the admissions. The admissions can be used in conjunction with other evidence to prove the corpus delicti. The admission can be used to prove one or more of the essential elements of a particular crime. The corpus delicti does not have to be proved independently of the statement any more, according to the Supreme Court of the United States.

34 **THE COURT:** Then if I properly understand Mr. Bartle's reasoning, he proceeds on to the position that due to the death of the complaining witness you have no testimony to prove the commission of the offense. In other words, I assume that he objects to the testimony of Officer Dwyer as to the statements of Lee Bong on the grounds that this is hearsay and is inadmissible. What do you say to that position?

MR. FLANNERY: My position on that is that Lee Bong's statements to the police were not hearsay, they are an exception to the hearsay rule, because

they were spontaneous declarations made under a condition of shock and strain. The officer has testified that Lee Bong was nervous and he was shaking when he had the gun on the defendant and my authority for that theory is a recent case cited by the United States Court of Appeals of the District of Columbia, I have the advance sheet. The opinion came down January 19th, 1956. It is Virgil V. Lampe versus United States of America.

* * * * * * * * *

35 MR. FLANNERY: It was a homicide case, two defendants tried for homicide. The police around 4:10 a.m., in the morning, saw the deceased walking along Rhode Island Avenue and he had been badly beaten and was breathing with difficulty and appeared to be in a dazed condition. His speech was partly incoherent, but understandable.

He was asked what happened, and he said, "Get me to a hospital. I have been beaten up by two men."

THE COURT: Does that case involve the two so-called "wino's" that had been out in some Government reservation for some days under a trestle, or something of that kind?

MR. FLANNERY: Yes, Your Honor, it is.

He gave three statements, this first one given at 4:10 a.m. was held by the Court of Appeals to be admissible.

Then 40 minutes later, 4:50 a.m., the officers with the deceased in their custody went to this nearby park, found the two defendants in a drunken sleep.

The three men were taken to a precinct where 40 minutes after they first contacted the deceased the deceased made a second statement and implicated the two defendants.

36 The Court of Appeals in the course of this opinion said that they would hold that that was admissible.

The third statement of the victim, given some eight hours later, the Court of Appeals held had been erroneously admitted into evidence, but because of the other strong evidence in the case, they did not reverse.

But there they hold that these two statements of the decedent, one at 4:10

and one at 4:50 a.m., were spontaneous statements and were admissible in evidence.

Now, I think the same principle of law applies here.

THE COURT: Where do you find the guarantee of reliability that makes the statement admissible without the fortification of cross-examination?

MR. FLANNERY: The guarantee lies in the circumstances and the spontaneity of the remarks and the lack of ability on the part of the victim to reflect and concoct a story, the fact that the statement was made practically contemporaneous -- almost contemporaneously with the commission of the crime.

The theory of admissibility of this testimony lies in the fact they are spontaneous statements. There is no opportunity on the part of the victim to reflect and devise a statement.

37 I think the statement of the victim would be admissible under the Lampe case and the other cases cited in Lampe.

Now, in addition to that, Your Honor, there is substantial independent evidence in this case, independently of the admission of the defendant, the substantial evidence being that first the police officers hear shots, they respond to the scene and they see the victim holding a gun on the defendant.

Now, that is substantial independent evidence.

They recover the wallet in the trash can. That is independent evidence, independent of the confession of the defendant.

I think we have independent substantiating evidence and we also have the statements of the victim which are admissible, an exception to the hearsay rule under Lampe, and the cases cited therein. I think there is sufficient in this case, Your Honor, to submit it to the jury.

THE COURT: Are you finished?

MR. FLANNERY: Yes, sir. If Your Honor has any questions I would be happy to try to answer them.

THE COURT: Anything more, Mr. Bartle?

MR. BARTLE: I would like to call your attention just to two things. It won't take but a moment. Referring back to the Opper case, continuing where

38 Mr. Flannery ceased --

THE COURT: What page is this? Still 93?

MR. BARTLE: Yes, Your Honor, the bottom of the page:

"Turning to the instant case, it is clear that there was substantial independent evidence to establish directly the truthfulness of petitioner's admission that he paid the government employee money. But this direct corroborative evidence tending to prove the truthfulness of petitioner's statements would not establish a corpus delicti of the offense charged."

The prosecution has stated the mere shots were outside the extrinsic evidence. We do not know whether the complainant and the defendant here had not been arguing inside for an hour.

THE COURT: The defendant knows, does he not?

MR. BARTLE: The defendant knows, he says there was no argument. Therefore, there was no basis for the shots. But we know there were shots. And I conclude the prosecution cannot be bottomed upon the allegations and the statements made by the officers and based alone on what the defendant has said and what some other party has said.

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40 April 15, 1958

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41 THE COURT: The Court has reviewed the cases which counsel cited in this matter in yesterday afternoon's argument. I would like to have or hear some additional evidence from the Government's witness with reference to the Government's contention that this is a spontaneous declaration. I would like to hear specifically what the condition of the deceased Lee Bong was.

* * * * * * * * *

THOMAS G. DWYER

resumed as a witness called for and by the United States,

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42 THE COURT: The jury is in the jury room.

DIRECT EXAMINATION (Resumed)

BY MR. FLANNERY:

Q. You testified yesterday you heard the shots and then responded to the scene and there came a time when I believe your fellow-officer shown a flashlight into the yard and you saw Lee Bong with a revolver in his hand? A. Yes, sir.

Q. Now, what did you notice about Lee Bong at that time, about his condition? A. He was very excited and very nervous and he kept shouting to the defendant, "You robbed me, you robbed me." He was shaking quite a bit.

Q. He was shaking quite a bit? A. Yes, sir.

Q. His limbs were trembling? A. Yes, sir.

Q. And then there came a time, I believe you testified, you finally gained access to the back yard and saw Lee Bong? A. Yes, sir.

Q. When you got up closer to him what did you notice about his condition?

43 A. He was very excited and very frightened, I would say. In talking to him he sort of -- his speech was sort of broken, indicating that he was very frightened.

Q. Now, this man had a store on your beat, didn't he? A. Yes, sir.

Q. And you had seen him on prior occasions? A. Yes, sir.

Q. Had you seen him on occasions when he was calm, when there was nothing worrying him? A. Yes, sir.

Q. At that time what would his speech be like? A. Well, it would be very calm. I mean, he was never very excitable.

Q. Would his speech be incoherent and broken on those occasions when you saw him when nothing was bothering him? A. No, sir.

Q. Would you say on this night he was trembling and appeared to be very frightened? A. Yes, sir, he was.

Q. Can you be any more specific about that? In your own words, describe his condition for His Honor's benefit.

THE COURT: Why do you say he was frightened? What makes you say that?

44 THE WITNESS: Well, he was shaking very much, Your Honor. I don't know, even when he was holding the gun on the defendant he was very upset in his actions.

He was shaking all over.

BY MR. FLANNERY:

Q. How was he holding the gun? Out like this, or like this (indicating)? A. He was holding it out, and his arm was shaking.

Q. Was his arm shaking when he was holding the gun out? A. Yes, sir.

MR. FLANNERY: Is there anything else Your Honor would like to ask?

THE COURT: Do you have any further questions?

MR. FLANNERY: I think I have exhausted that subject, Your Honor.

THE COURT: Mr. Bartle, do you have any other questions on this point?

MR. BARTLE: Just one or two.

CROSS EXAMINATION

BY MR. BARTLE:

Q. You have stated you were acquainted with Lee Bong from your duty on the beat. Now, had you ever seen Lee Bong when he was excited before? Did you ever have any discussion with him when he seemed to be angry about some trivial matter? A. Yes, sir, I have.

45 Q. Was it his nature that if anything went against him that he would become excited? A. Not to the extent that he was that night. I have never seen him in that condition before.

Q. But on other occasions you have seen him when he was excited and he spoke normally or incoherently, or half-way between? A. He spoke more or less normally. His speech was just a little faster than usual when he was excited about say, someone causing trouble in the restaurant.

Q. Now, under normal conditions, being a party of another race, was his English reasonably clear? A. Yes, sir, it was.

MR. BARTLE: That's all.

REDIRECT EXAMINATION

BY MR. FLANNERY:

Q. Did Lee Bong have any physical injury, did you notice?

THE COURT: On this occasion.

BY MR. FLANNERY:

Q. On this occasion? A. Yes, sir.

46 Q. What was that? A. He had a cut on his hand.

Q. Did you ascertain from your investigation how the cut on his hand had been sustained by him? A. Yes, sir. He said the complainant bit him.

Q. Bit him?

THE COURT: The complainant?

THE WITNESS: The defendant. I'm sorry.

BY MR. FLANNERY:

Q. Lee Bong was taken to the hospital that same morning, wasn't he? A. Yes, sir.

Q. And when did he die? A. Well, he was pronounced dead at 7:30.

Q. In the same morning? A. Yes, sir, that is when he was found.

Q. Did he have a heart attack? A. Yes, sir.

MR. FLANNERY: That is all.

THE COURT: Anything more, Mr. Bartle?

MR. BARTLE: No, Your Honor.

THE COURT: The Court believes upon the basis of the case of Lampe versus the United States that the declarations of Lee Bong are spontaneous declara-
47 tions, that they are without the hearsay rule, and are admissible in evidence.

The Court is of the further opinion that upon the basis of the case of Opper versus the United States, in 348, U. S. Reports, that the corpus delicti may be proved by the use of this evidence.

I believe, consequently, Mr. Bartle, that I must deny your motion to suppress the evidence. You may bring in the jury, Mr. Marshall.

(Thereupon the jury resumed their positions in the jury box.)

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DIRECT EXAMINATION (Resumed)

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Q. Now, when you went to the back yard, Officer Dwyer, what did you do at that point? A. To look for the wallet? Is that what you are referring to?

Q. Yes, sir. A. I immediately went to the shed where I saw the defendant, where I first observed the defendant coming out of, and I searched the shed for the wallet, and I noticed inside of the shed there was a hole where the boards

had been knocked out and I looked through the hole, and right at the
48 side of the hole was a trash can, and the wallet was sitting in it.

Q. I show you Government's Exhibit 1. You have identified this, have you not? A. Yes, sir, I have.

Q. That is the wallet that you found? A. Yes, sir, it is.

Q. Very well. Now, after you recovered the wallet as you have described, namely, Government's Exhibit No. 1 for identification, and its contents, what did you do next? A. I went immediately back into the restaurant.

Q. Who was there when you went back into the restaurant? A. Officer Harned, Lee Bong, and the defendant.

Q. What occurred at that point? A. I showed the wallet to the defendant and then he admitted that he had taken the wallet from Lee Bong.

Q. What did he say, if you can be more specific? A. He said that he didn't mean to hurt anyone. He said his intention was to be locked into the restaurant
49 and to break out and steal whatever he could after the premises was locked up for the night.

Q. Did he say that he had done that, that he had remained in the restaurant? A. Yes, sir.

Q. What did he say occurred after he had remained in the restaurant? A. He said as Mr. Bong opened the door --

Q. What door? A. The door to the ladies' room -- that he was afraid and started to tussle with Mr. Bong and took his wallet and ran out the back door.

Q. All right. And did you ask the defendant what he did after he ran out the back door? What did he say about that, with respect to the wallet? A. He said that he was trying to get through the hole in the fence and dropped it through.

Q. All right. Now, then, what did you do from that point on, after the defendant made that statement to you? A. Then Mr. Bong related to us the whole story.

Q. What was Mr. Bong's condition at that time? A. He was very excited, very nervous. He was shaking all over.

50 Q. Now, Mr. Bong related something to you at that time? A. Yes, he did.

Q. How long was that after you first arrived on the scene? A. I would say approxima tely five minutes.

Q. Five minutes. All right. Now, what did Lee Bong say to you in the presence of the defendant while he was nervous and shaking? A. He said as he always did in preparation to locking up the store he had gone and checked all the doors and windows and he was in the process of checking the men's room and ladies' room. As he opened the door to the ladies' room the defendant came at him with a beer bottle and he started tussling with the defendant. During the tussling the defendant bit him on the hand and knocked him to the floor, took the wallet, and ran out the back door.

Q. Did you observe Lee Bong's hand? A. Yes, sir.

Q. What did you notice? A. Blood on his hand.

Q. All right. Then what did Lee Bong say he had done after he had gone to the back yard? A. He said after the defendant ran out the back door he

51 ran into the kitchen and got his revolver and ran into the yard after the man and fired it at the defendant.

Q. And do you recall whether or not he told you how many time s he had fired? A. No, he didn't tell me. I believe I heard three shots.

Q. All right. Now, after that happened, did there come a time when you took the defendant to the police precinct? A. Yes, sir.

Q. What time did you arrive at the precinct? A. I would say about 3:25.

Q. And I believe you testified that you had arrived on the scene about what time? A. About 3:10.

Q. Now, did there come a time -- just answer this yes or no: Did there come a time at the precinct when the defendant again related what had happened that evening in Lee Bong's restaurant? A. Yes, sir.

Q. What time was that when he related it again? A. I would say about 3:30, after he was booked.

Q. 3:30, after he was booked? A. Yes.

52 Q. All right. What did the defendant tell you at that time, 3:30 a.m.? A. I asked the defendant what happened in his own words, and he said it happened

just the way Mr. Bong related it in the restaurant.

MR. FLANNERY: All right. Your witness.

CROSS EXAMINATION

BY MR. BARTLE:

Q. I believe you have testified that you did not caution the prisoner at any time during the periods he was in your custody that any statements made by him could be used in this or other cases? A. That's correct.

Q. I believe you have also testified that he signed no written confession? A. That's correct.

Q. Now, when he reiterated his story as indicated at the precinct, did you type up the report? A. Did I type a report?

Q. Yes. A. Yes, sir.

Q. And did the defendant read it after you had typed it or written it? A.
53 I don't recall whether he did or didn't.

Q. So therefore you can't say whether he knew the actual contents? A. No, sir, I couldn't say.

Q. Now, getting back to the restaurant, have you in your previous tours of duty inspected the place around closing time? A. Yes, sir, I have.

Q. Have you inspected it after closing time? A. Well, at closing time, I would be there afterwards.

Q. Now, so that the jury may be familiar, what would be the closing time? A. Two o'clock.

Q. And did the occurrences which you have related, as stated to you by Lee Bong, was that his normal procedure? A. His normal procedure was he ate after he locked the doors and his help swept the place out and then after he was finished with his dinner he would go and lock the place up and go home for the night.

Q. Then the place was -- if we can assume that on that evening the normal procedure took place -- the place was locked up at or about two o'clock? A. I imagine so, yes, sir.

54 Q. And by being locked up, I believe you have formerly testified that on

the back door there was a slide catch, or bolt? A. Yes, sir, I believe so.

Q. Now, in his normal routine, wouldn't he go through the premises after he locked it up? A. Would he what?

Q. Wouldn't he inspect the premises when he locked up? A. That is what I testified, he was inspecting the premises in preparation for leaving for the night.

Q. And yet, this occurred, I believe you testified, at 3:10? A. Yes, sir.

Q. You said he locked up at two o'clock. A. He closed the restaurant at 2:00.

Q. He closed at two o'clock. I believe you stated he normally makes an inspection after he closes, or can't we assume that that normally would be done when he closed? A. He normally makes the inspection after he finishes his dinner, as I testified, he eats his dinner after he has closed the business, sent the people out, he locks the front door, he normally eats his dinner, the help cleans up. When he has finished his dinner he makes an inspection, locks the front door and goes home.

55 Q. Oh, the help cleans up? A. Yes, sir.

Q. Is it normal to clean washrooms? A. I don't know whether they cleaned the wash rooms that night or not.

Q. Now, when you say it is normal for the help to clean up, do you mean that he told you it was normal or you have from your own experience seen the help clean up afterwards? A. When I say "clean up," I mean cleaning the tables off and sweeping the floor in the main part of the restaurant. I have seen them do that. I have seen them pick the bottles off the table, put them away, and sweep the floor in the main part of the restaurant.

* * * * * * * *

Q. Returning to that rear door, did you make an inspection of it? A. Inspection of the rear door? A. Yes, when you went out. You testified that there

56 was a latch or a push latch of some kind. A. I testified that I believed that is what was there.

Q. But you made no inspection to ascertain whether it was a lock on there

which would require a key or whether there was any other type of safety feature on it? A. No, sir. To the best of my recollection, I believe it was a slide latch.

Q. A slide latch. But actually you didn't inspect it at all? A. No, sir.

Q. Now, when you left the defendant with your associate officer and went back to the rear somewhere, approximately how far was that from where the defendant and the other officer and Lee Bong were standing? A. I would say about from here to the end of the courtroom, almost.

Q. I see. Now, did Lee Bong accompany you to the rear? A. I don't recall whether he did or didn't.

Q. Were you and Lee Bong, at any time during this period when you were in the restaurant, out of the presence of the defendant and your other officer?

57 A. Was myself and Lee Bong?

Q. Yes, were you away from these two -- referring to the defendant and your fellow officer? A. I don't recall being with Lee Bong with myself only the time that I went to get the wallet.

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REDIRECT EXAMINATION

BY MR. FLANNERY:

Q. Officer Dwyer, I will show you this wallet which has been marked in evidence as Government's Exhibit 1 for identification. Can you identify that wallet? A. Yes, sir.

58 Q. How do you identify it? A. By the two cuts on this edge of the wallet.

Q. Very well. When you recovered the wallet, what did it contain? A. Twenty-eight dollars.

Q. And you have checked the money in this wallet, have you not? A. Yes, sir.

Q. What is contained in the wallet? A. Twenty-eight dollars.

MR. FLANNERY: Your Honor, at this time I wish to offer in evidence Government's Exhibit No. 1 for identification, and its contents.

THE COURT: I will assume, Mr. Bartle, that you object on the grounds

that you argued yesterday afternoon. This will be a continuing objection.

MR. BARTLE: Yes. I would like to make that and have it entered in the record so it won't be necessary to object all through the trial.

THE COURT: The objection will be overruled. The exhibit will be admitted.

59 (Wallet and contents, marked for identification Government Exhibit No. 1, was admitted in evidence.)

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RECROSS EXAMINATION

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Q. You mentioned identification of it by two little knotches on the sides. Were they on the wallet or did you put them on the wallet? A. I put them on the wallet.

Q. I see. And that is the identical wallet that was found in the trash can on the premises? A. Yes, sir.

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WILLIAM A. HARNED

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DIRECT EXAMINATION

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60 Q. You are a police officer and a member of the Metropolitan Police Force? A. Yes, sir.

Q. Are you not, sir, attached to No. 2 precinct? A. Yes, sir.

Q. Now, then, directing your attention to January 25th, 1958, and to the time around three a.m., were you employed by the Metropolitan Police Force, No. 2 precinct, at that time? A. Yes, sir.

Q. Were you on duty at about that time? A. Yes, sir.

Q. Were you with a fellow officer? A. Yes, sir.

Q. Where were you? Who was the officer, first? A. Thomas Dwyer.

Q. Where were you and Officer Dwyer at around three a.m., in the morning, on January 25th, 1958? A. We were pulling a box on the southeast corner of 14th and P.

61 Q. Is that the Northwest section of Washington? A. Northwest section of Washington.

Q. D. C.? A. Yes, sir.

Q. Now, while you were pulling the box, did anything happen of an unusual nature? A. We heard shots.

Q. How many shots did you hear? A. I don't recall right now. About three, I would say, roughly, about three.

Q. After you heard the shots, what did you do? A. Ran into the direction of the shots.

Q. Where did you run? A. Ran diagonally across the street to the northeast corner.

Q. Keep your voice up, please. And what did you do at that point? A. We heard some shouting, it was over in back of a wall. On the northwest corner there is a gas station and at the far end of the first building that faces on to 14th Street, there is a wall that separates the gas station from the back yards of those buildings, and the shouts were coming from behind the wall.

62 Q. Could you distinguish what was being said, or did you just hear shouts? A. Not right then. We heard the shots first, and then we heard the shouting. It was later we found out it was a Chinese that was hollering.

Q. Tell what you did. You heard the shouting. What did you do next? A. There was a couple barrels standing alongside the wall. We got up on the barrels and looked over the wall.

Q. When you looked over the wall, what did you see? A. Well, we saw Mr. Lee -- Lee Bong -- the proprietor of Lee's Restaurant, in the back yard with a gun in his hand and he was hollering at the time, "You robbed me. You robbed me."

Q. And did you have a flashlight at that time? A. Yes, sir.

Q. Did you? A. We had the flashlights shining into the yard.

Q. What did you do after you saw that and heard what you said you heard? A. Well, at that time the defendant came out of a small garbage shed -- it is a garbage shed in the extreme rear of the yard -- then we saw the defendant.

63 Q. Do you see the defendant here today in the courtroom? A. Yes, sir.

Q. Where is he? A. Right there (indicating).

Q. Seated at the counsel table? A. Yes, sir.

Q. Very well. Now, then, you saw the defendant come out of the shed as you have described. What did you do next? A. Well, we put our lights on the defendant, and my partner Thomas Dwyer, we told Lee to go around, open the door, and my partner, Officer Dwyer, went around to the front, and I had my light and also my revolver on the defendant, and I told him to stand still. When Officer Dwyer went around to the front Mr. Lee was still in the back yard hollering. He said he was robbed.

Q. At that point had you gone into the back yard, or were you still up on the barrel? A. Still up on the barrel. And then Officer Dwyer came back and said, "Tell him to open the door." So we told him again. He was pretty upset.

Q. Now, you say "he was upset." Who do you mean? A. Mr. Bong. Lee Bong.

64 Q. What did you notice about Mr. Lee Bong's condition at that time? A. He was pretty much upset and excited.

Q. Excited. Did you notice anything about his physical appearance? A. Well, he just kept on babbling. Physically, no. You mean physical harm of any kind?

Q. You said he was excited. All right, what happened next? A. Well, after Mr. Bong finally decided to open the door, we went inside, Mr. Dwyer went in and came out in the yard and took the defendant, put him under arrest. Then I went around and went inside. When we got inside, Mr. Bong was pretty excited and hollering that he was robbed, and we couldn't get a straight story until we calmed him down a little bit, and then we found out that the defendant was hiding in a ladies' bathroom.

Q. Now, at that time did Lee Bong say something to you? Did Lee Bong relate to you what had happened? A. He kept pointing at the man, and said, "He robbed me. He robbed me."

65 Q. What did Lee Bong say at that time in the presence of the defendant?

Did Lee Bong tell you what had happened? A. Yes, he told me.

Q. What did he tell you? A. He told me that he found him in the ladies' bathroom, hiding in the ladies' bathroom, when he opened the door. He said he always checked the men's and ladies' bathrooms and he found the defendant, he surprised him, and the defendant jumped on him. And in the scuffle -- right outside there is a bunch of cases of empty beer bottles, and the defendant picked up a beer bottle and in the scuffle the defendant had bit Mr. Bong's thumb -- it was just a scratch.

Q. Did you notice Mr. Bong's thumb? A. Yes. It was just a scratch.

Q. Then what did Lee Bong say had happened? A. Then the defendant knocked him down on the floor and took his billfold. And of course both doors were locked, the front and back, and he ran to the back door and the door was locked, and he had to unlock it to get out in the yard.

In the meantime Mr. Bong had gotten up and also gone in the back and got a gun that he keeps in the back. And by the time he got the gun the defendant
66 had the door open and Mr. Bong pursued him out in the back yard and fired a couple shots at him.

Q. All right. Then did there come a time when Officer Dwyer left to go somewhere? Did Officer Dwyer go to the back yard? A. Yes, he went out in the back yard. Mr. Bong said he was robbed, he took his billfold, and we couldn't find it on him, so Officer Dwyer went out in the back yard and he said he found it in the trash can.

Q. Then Officer Dwyer came back, did he? A. That's right.

Q. Was that a short time later? A. Just a few minutes later.

Q. When Officer Dwyer came back did he have something with him? A. He had a billfold.

Q. When Officer Dwyer came back with the billfold, was the defendant being questioned at that time? A. Yes, he was.

Q. And what did McQueen say at that time? A. Well, he denied it up until the time Officer Dwyer came back with the billfold, and then he admitted he took the wallet.

67 Q. What did he say? To the best of your ability tell His Honor and the

jury what McQueen said when Officer Dwyer came back with the wallet? A. Well, he said that he was unemployed and he didn't mean any harm, he just wanted to hide in the bathroom until Mr. Lee Bong closed up, and then he was going to see what he could get out of the place.

Q. What did he say? A. He was going to hide in the ladies' bathroom until the place was locked up and then he was going to see what he could get out of the place. But Mr. Bong surprised him, and he took the wallet instead.

Q. Can you be a little bit more specific? Do you recall -- if you can recall -- what did he say, specifically? He said he hid in the bathroom, did he? A. He hid in the bathroom.

Q. What did the defendant tell you happened next? A. Mr. Bong surprised him in the bathroom and he said, I asked him why he scuffled with Mr. Lee -- Mr. Bong, that is -- and he said, "Well, what would you do? The man surprised me. I was going to get what I could out of the place."

Q. So what did he say about the wallet? A. Well, when he scuffled with Mr. Bong, I guess he decided to take the wallet.

68 Q. Did he say he took the wallet? A. He admitted he took the wallet.

Q. All right. Then what did he say he did after he took Lee Bong's wallet? A. After he got the wallet he ran to the back door.

Q. All right. Then what did the defendant say he did next, after he ran to the back door? A. He unlocked the door and got outside and he run into the blind alley. He couldn't get out the back.

Q. All right. Did there come a time when the defendant said whether or not he had done anything with the wallet? A. After Officer Dwyer came back with it, he admitted that he threw it outside, he threw it out in the back.

Q. All right. Now, then, did there come a time when you and Officer Dwyer went to a police precinct with the defendant? A. Yes, we did.

Q. And what police precinct was that? A. No. 2.

Q. And at that time, when you arrived there, just answer this yes or no: Did you question the defendant McQueen about this case again? A. Yes.

69 Q. Do you recall approximately what time that was? A. I would say around

3:20.

Q. Around 3:20? A. Yes.

Q. Now, at that time, what did defendant McQueen say about this case? A. Then he denied it when we got to the station. He said he didn't do anything.

Q. When you first got to the station did he say anything? A. Not other than answer our questions, that I can recall.

Q. Do you recall what he said when he first got to the precinct? A. He said he didn't do anything.

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CROSS EXAMINATION

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70 Q. No. What time does a restaurant of that type normally close? A. Two o'clock.

Q. Have you ever been there around two o'clock? A. Where?

Q. Are you at all familiar with the operation of the restaurant after closing? A. The restaurant doesn't operate. You mean what Mr. Bong does after it closes?

Q. What does Mr. Bong do? A. Well, as far as I know he operates the place alone, by himself, with the waitress, and the waitress goes home, and he does the cleaning up and counts up, and so forth.

Q. Does he do the cleaning up or does the waitress do the cleaning up? A. The waitress cleans the tables, so far as I know, and he cleans up in the kitchen.

Q. I see. Now, coming back to the occurrence where you were looking over the wall, I believe you testified that the defendant here was coming out of a shed in the back; am I correct? A. That's right.

71 Q. Approximately how far, then, was the defendant from Lee Bong? A. Oh, about 15 feet, I would say, roughly 15, about 15 feet; ten or fifteen feet.

* * * * * * * * *

Q. After Mr. Dwyer had opened the front door and he and the defendant had gone into the restaurant and you came into the restaurant, where were they

standing? A. A little better than half-way down the restaurant, just at the entrances of the kitchen, and the bathrooms going off to the side.

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73 Q. Did the defendant sign any papers where he acknowledged the commission of this crime? A. Not to my knowledge.

74 Q. Durin g the time that you were in the restaurant with the defendant, was he ever kicked or manhandled in any way? A. No, sir.

Q. Were there ever any threats made? A. No, sir.

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HAROLD McQUEEN

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DIRECT EXAMINATION

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75 Q. Approximately how long have you been in the District of Columbia? A. At the time that this happened?

Q. Yes. About when did you arrive here? A. About December 5th.

Q. Had you ever been in Lee Bong's before? A. Yes, I had been coming in about ever since I had been here.

Q. Approximately how far is it to where you lived? A. A little over three blocks.

Q. About three blocks. Was that your normal place of meeting or congregating or drinking? A. Yes, it was.

Q. All right. Coming to the latter part of January or on about the 25th, did anything occur on that evening? A. The night of the 25th I went into Mr. Bong's restaurant about 7:30 p.m.

Q. You went there about 7:30. Going back a little before that, what had occurred during that day? Had you been out looking for work, or what had you been doing? A. I had been out looking for work, and later on that evening I had a few drinks, and I came in to Mr. Bong's.

76 Q. After, you arrived at Lee Bong's, about 7:30 in the evening? A. About 7:30.

Q. Did you have something to eat? A. Yes, that's where I ate, at Mr. Bong's.

Q. You normally ate at Mr. Bong's? A. Supper there, just one meal.

Q. So since you arrived in Washington, approximately how many times would you say you have been in Lee Bong's? A. Several times. I couldn't say how many times.

Q. Would you say five times or ten times or twenty times? You were here about a month. A. I would say about ten times -- more than ten times.

Q. Were you familiar with the interior of the place? A. Yes, everywhere except the kitchen. Yes, I was familiar with it.

Q. You had never been in the kitchen? A. He had a sign up there at the kitchen, you go back there and get water, right at the door there is a sign, "No entrance," and you can stand right there and get water.

Q. Coming back to the evening in question, you say you arrived about
77 7:30, you had your dinner. Did you have any drinks before dinner? A. Beer, that's about all. He sold beer in there.

Q. So you had some beer with your dinner? A. Yes.

Q. After that what occurred? A. I started drinking, drinking beer, and around, it is about around ten or eleven o'clock, the waitress started -- I started dozing off -- so the waitress told me to go out and get some air. I went out and it was raining very hard at that time. All I had on was this jacket. So I came back in, and she told me to keep walking, because if the police come in they are liable to take you to jail if you are asleep. I said "O.K." I knew her very well. I said "O.K." I started dozing off again and she came and woke me up again. So that was about, it must have been about, close to one o'clock, or a little after one, and I went to the bathroom to wash my face. When I got in there, there was a lot of fellows standing around this little handbowl -- it's a small bathroom, there is a little hand sink here, and two doors there, and then the toilet is there, so I sit down, and that's, where I was until Mr. Bong woke me up.

78 Q. Now, did you have any drinks in the bathroom? A. No, I didn't drink

anything. I went in there to wash my face. I didn't have anything in my pocket to drink.

Q. I see. Now, early in the evening, had you had any liquor, any hard liquor? A. Yes, I had quite a bit of drinking ever since around, it must have been three o'clock, four o'clock.

Q. Please talk a little louder. A. I had been drinking ever since around three, maybe three-thirty, something like that, and had been drinking whisky.

Q. Now, that was before you went to Lee Bong's? A. That was before I went to Mr. Bong's.

Q. After you arrived at Lee Bong's had you had any hard liquor to drink? A. Yes, I had had quite a bit. I met a few friends of mine and we chipped in and bought a couple pints of whisky and it was three of us.

Q. There were three of you. And was that all consumed on the premises? A. No, we drink some after we brought some in with us into Mr. Bong's with us.

79 Q. During the evening, did you go out of the restaurant at all, other than the one time? A. Yes, I went out to the liquor store. The liquor store is right on the corner.

Q. And then you came back in. You testified, I believe, about one o'clock you went into the men's room to wash your face? A. About one-ten.

Q. All right. Now, what occurred in there? A. After I got in the bathroom, I sit down and that is where I woke up. When I woke up, Mr. Bong was pulling on my jacket. He was screaming something at me.

Q. So this may be clear, you went in and sat down on one of the stools and fell asleep; is that correct? A. Yes, and I didn't know how much time had elapsed when Mr. Bong is pulling on me, I thought the place was still open. I thought he just came in, so I told him, "O.K., I am going back out and sit down out in front there." So he pulled me on out and he told me that the -- after he pulled me on out, he said "I am closed." I said, "O.K." I said, "I am going." As he was pulling me out, I told him, I said, "What are you pulling on me for?" He hit me with his hand some way, he hit me with his hand across

the face, and so he pulls me out there.

80 After I gets out I can see that there is nobody in the place. So he told me, he said, "I'm closed." So I goes over to the -- I say, "I will leave, then."

So he was excited then but he just calmed down, and he said, "O.K., you go." So I started to go out the front door, it was the only way I know I can go out. He said, "No, don't go out that way, you go this way." So he took me to the back door, took the keys out of his pocket and opened the door. There was, I don't know how many locks on there, but he took keys out to let me out in the back yard, and there was a big high fence when I got out there, and I walked out to the fence and there is a lock on the gate and I turned around, and I said, "Lee, the gate is locked, I can't get out."

He walked out the door with the pistol in his hand. He said, "You're a bad guy. You're a bad guy, and you walk about four or five feet from me." And I said, "What is the pistol for?" And he fired at my feet, and about the time he fired the officer shot a light over my feet, and he said, "I'll hold him here until you get here." He was standing there with the pistol in his hand, standing there like frozen.

81 The officer said, "Hold him, we'll get there." And this other officer said, "Go around and unlock the door and let us in." So he just stood there, he didn't say nothing. He just stood there. Finally the officer, he went and let him in.

Q. All right. There has been testimony here that there is a shed back of the place. Have you ever been in that shed? A. No, I didn't see any shed. The only thing I saw was the gate. I didn't see any shed.

Q. When you get out in the back yard, there is testimony there is a high wall on one side. And how large is that back yard? A. Oh, it is, I would say, about maybe 15 feet -- it was dark. It's the first time I have been there. I know there was a big, high fence all the way around it. I couldn't say just how big it was. I would say about 15 feet square, or something like that.

Q. How far was Lee Bong from the building, or the back door, either one? A. He must have been standing about -- he was out in the yard, I would say about ten feet from the back door. He was standing about four feet from me.

Q. Then he would be approximately five feet from the building; is that
82 correct? A. Yes.

Q. All right. Now, after the officers arrived, and you went inside, what transpired there? A. The officer came and took me inside and asked me -- one of them goes back and starts talking to Mr. Bong in the kitchen, I know he goes in the kitchen, I didn't see where else he went. And the other one held me outside, and I told him, I said, "I haven't did anything." So he didn't say much to me. That was the older one. He didn't say much to me. After a while this other one came back with the wallet, counting the money. Him and Mr. Bong came back together, and he was counting the money. And he said, "He took his wallet." I said, "Well, I didn't take his wallet."

Q. All right. You are getting a little ahead of yourself. You were in the back yard with Lee Bong, the officers were looking at you over the fence, and had a gun on you. Am I correct, one went around through the front. And who let the officer in that went to the front of the building? A. Mr. Bong, he let him in.

Q. All right. When Mr. Bong let the officer in, did the officer that was
83 given admission by Mr. Bong come back to you in the back yard? A. Yes, he came back and Mr. Bong was standing there with the gun on me, and he took me back up into the restaurant.

Q. Then he took you back into the restaurant? A . Yes.

Q. Now, was there any conversation while you were in the restaurant with this one officer and Lee Bong? A. No, he didn't say anything. He was asking -- no, he didn't say anything.

Q. Did Mr. Bong say anything at that time? A. I think he asked him why didn't he come around and open the door for him.

Q. Then did the other officer come in? A. Yes, he came in.

Q. And when the other officer was there, was anything said, that is, about being robbed? Did Mr. Bong make any statement he was robbed? A. No, he didn't make any statement. He was mad. He didn't make any statement about robbery.

Q. Subsequent to that, did one of the officers leave and go towards the

rear of the building? A. Yes, the younger one, he went toward the rear.

84 Q. Did anyone go with him? A. Mr. Bong.

Q. Mr. Bong went? A. Yes.

Q. So the two of them went to the rear of the building? A . Yes.

Q. After they returned, did they have anything in their hands? A. They had a wallet and was counting money, and had opened it up and was counting money.

Q. Had you ever seen that wallet before? A. No, I didn't.

Q. Had you ever had any words with Mr. Bong that might create ill feeling in the past? A. No, I never had any argument with Mr. Bong before.

Q. Now, during the time you were in custody there, did the officers touch you or threaten you in any manner? A. Yes. After he came back in he said, "I thought you said you didn't take this guy's wallet." I said, "I didn't take his wallet." And right away they started beating me up, one kicking me, and the other one was hitting me.

85 Q. What actually took place? A. They came back through the kitchen, and he started taking his rain slicker off, and he had this money in his hand. He said, "I thought you said you didn't take this guy's wallet."

I said, "I didn't take his wallet, he can tell you." And he started hitting me with the butt of his hand. The other one kicked me at the time. So I said, "I didn't take his wallet." And he says, "Well, you know you took the guy's wallet." I said, "I didn't take the wallet."

He said, "You know you took it." So I said, "Have it your way, anyway you want it." They kept beating me up. So I says, "Just have it that way."

Q. How many blows were struck, just the two? A. Pardon me?

Q. You said one of them struck you with the base of his hand? A. With the butt of his hand, like this (indicating).

Q. And one kicked you? A. Yes.

Q. Were those the only two blows? A. No, they just kept kicking and hitting me.

86 Q. I see. Did your skin show any abrasions or lacerations? A. My legs, I was stiff for two or three days; through here (indicating) was sore. My

jaw, my mouth was cut up inside.

Q. Now, after that, you were taken down to the precinct. Were there any questions asked you there? A. Onliest thing, he said, when he was typing up, he said that, "You know that you went in to get this guy's -- into Lee Bong's place." I said, "Sure, I was there. I didn't go in to rob him." He said, "You know you robbed him, you were in there to rob him." I said, "No, I wasn't." He told me, "Don't tell me you were in there sleeping. I'm going to tell you something, and if you tell me you were in there sleeping again, I am going to kick your brains out. I don't want to hear that any more." So I said, "O.K., then, I can't say anything. I can't say anything."

Q. Did you make any written statement to the police? A. No, I didn't write anything.

Q. Did the police at any time tell you that any statements you made might be used against you? A. No, they never did tell me anything.

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87 CROSS-EXAMINATION

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Q. Mr. Defendant, you stated that you arrived in the District of Columbia on December 5th; is that correct? A. Around that time. I am not sure.

Q. 1957? A. I have lost track of that time. Yes.

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88 Q. You weren't working when this incident occurred, were you? A. No, I was looking for work.

Q. You were looking for work on January 25th? Were you looking for work on January 25th? A. Yes, that day.

Q. You testified, did you not, that you started drinking that afternoon. You weren't looking for work then? A. You don't look for work in the afternoon. I went to look for work in the morning.

Q. Where did you go in the morning? A. Well, I went out to Virginia there, I had been out there once and I went out with a fellow to Arlington, a bowling alley, a fellow told me to come back.

Q. The bowling alley? A. Yes, on Arlington Boulevard. It's twice I have been out there.

Q. You say a man told you to come back? A. Yes, he told me work is better on Sunday, bowling.

Q. So you came back from Virginia that afternoon and started drinking; is that correct? A. That's right.

89 Q. Where did you get the money to drink? A. I had money. I had about five dollars, I guess, when I started out. I spent some of it for car fare.

Q. Now, you say you were with two other people that afternoon; is that your testimony? A. That's right, that evening, yes, when they got off from work. They were working.

Q. Oh, they were working? A. Yes, they just got paid.

Q. Who were they? A. I only know them as Sonny, and Robert.

Q. Sonny and Robert? A. That's the only names that I know them by.

Q. Where did they live? A. I know one of them lived on Q Street, I think, but I don't know his address. I don't know where the other lives.

Q. How long had you known these two men? A. I met them ever since I started eating in Mr. Bong's.

Q. Now, where did you meet them that day? A. I met them in Mr. Bong's.

Q. What time? A. Around seven-thirty.

90 Q. Around seven-thirty? A. Around seven-thirty, when I got back up there.

Q. What time had you gotten back from Virginia to the District of Columbia? A. Must have been around three, I guess, about three.

Q. Where did you go at three o'clock? A. Well, I went up on, I started to go to a show that day, and I didn't go, I stopped and bought a drink and started drinking with some fellows I just met, we started having a few drinks.

Q. What were you drinking? A. Drinking whisky, Ancient Age.

Q. Ancient Age? A. Yes. They all chipped in and got a pint and then I came on down there about seven-thirty.

Q. At seven-thirty you had supper; is that right? A. Around seven-thirty.

Q. And I believe you said you had some beer in Lee Bong's, is that right?

A. Yes, that's right.

Q. Did he serve liquor in his restaurant? A. No, he didn't; just beer.

Q. Now, did your friends stay with you in Lee Bong's for some time?

A. I went back out and got a pint of whisky and we drank it in there, like every-
91 body else do, drink it under the table.

Q. What time did your friends leave? A. It must have been about twelve-something, I guess.

Q. At night? A. Yes.

Q. Then I believe you testified there came a time that you went to, did you say, the men's room? A. Yes, that's right, the men's room.

Q. What time did you go there? A. It was about one-something.

Q. It was about one? A. About one. I remember looking at the clock before I went out. I remember saying, "It's getting late. I'd better be going on." I was talking to the waitress. It was about one-ten.

Q. You remember looking at the clock; is that correct? A. Yes, I did.

Q. And you knew it was about one o'clock? A. It was about one-ten when I started talking to the waitress the last time.

Q. One-ten when you talked to the waitress, you remember looking at the
92 clock, and it was one-ten, and your memory is very clear? A. Yes, around one-ten a.m., I remember looking at the clock.

Q. Your memory is very clear about everything that happened that day from the time you came back from Virginia, isn't it, to one o'clock? You came back from Virginia around three, and you remember everything that happened up to the time that you looked at the clock at one-ten a.m.; is that right? A. Yes, pretty clear.

Q. Now, after you looked at the clock and saw it was one-ten a.m., what did you do then? A. I said I started to go home and it was raining, so I came back, and sat down, and the girl woke me up, Dorothy, the waitress in there, she told me, "Don't go to sleep like that." So I said, "Well, I will go wash my face, and try to wake up."

Q. What time was it then? A. I don't know what time it was then. It was after one-ten. It was after one o'clock.

Q. All right, then what did you do? A. I went in to the bathroom and when I got in the bathroom a lot of guys was standing around in there drinking
93 over by the sink. When you go in the door, there is a sink. So I sat down in there a few minutes, I thought it was a few minutes, and that was it.

Q . Then you say there came a time when you saw Lee Bong; is that right? A. Pardon?

Q. Did you fall asleep there? Is that your testimony? A. Yes.

Q. Now, then, the next thing that happened, according to you, is when you saw Lee Bong. Is that right? A. Yes, Lee Bong was pulling me out by my jacket.

Q. And did there come a time when you grabbed hold of a beer bottle? A. When Lee came in the bathroom there, he pulled me out, and these cases of bottles were sitting there, so he got this bottle, and he said something, I couldn't understand him, it was in Chinese, I guess, he was talking funny there and I thought maybe he meant to get out of the bathroom, because people were coming in. I thought he meant to go back out and sit down.

So I told him, "I am going back and sit down." And he got the bottle there, and he was jerking and pulling and everything, so when he got this bottle I just grabbed his arm and the bottle fell back down on the case, I guess, I didn't see it any more. I grabbed his arm and he was mad, he was mad, so he hit me a couple times, he hit at me with his hand and hits me across the face.

94 Q. Did you bite him? A. No, I didn't bite him. He hit me. The onliest way I can figure he got his finger hurt, he hit one of my teeth, or he hit something that scratched his finger.

Q. Is it your testimony Lee Bong escorted you to the back door? A. Yes, he took me. I started to go out the front door. I said, "O.K., Lee, I'm going out." I started out the front door. He said, "No, no, you come this way, you go this way." So I said, "O.K.," so I goes on to the back door and when he gets to the back door he gets the keys out of his pocket, I think he got them out of his pocket, but he gets the keys and opens the door for me. I remember there were locks on the door. I don't know whether there was more than one. And he took the keys and opened the door and let me out in the yard.

Q. Did you take Lee Bong's wallet? A. No, I didn't.

Q. You never took his wallet? A. No, I didn't.

Q. Of course, I don't suppose you have any idea how Lee Bong's wallet got in that trash can, do you? A. I don't believe Lee Bong's wallet was in the trash can.

95 Q. You don't believe that? A. No.

Q. I see. When you got out in the back yard, what happened next, according to you? A. After I got out in the back yard, I walked up to the gate; there was a gate up there, I could see it, because the light was shining on it. I went to open the gate and it was locked, there was a padlock on it. I turned around and I said, "Lee, I'm going out here, there's a lock on the gate." He walks out the door, he wasn't saying anything. He walked out with a pistol. I said, "Lee, you haven't got to pull a pistol." And he said, "You're a bad guy. You're a bad guy." And he fired at my feet. He was standing about four feet from me. If he was shooting at me, he could have hit me.

Q. How far was Bong from you when he shot the gun? A. About four feet, I say four feet. He was close enough to hit me.

Q. You deny, don't you, ever going in the shed? A. I didn't see any shed.

Q. You didn't go in the shed? A. He was firing a pistol at me.

96 THE COURT: Just answer the question. Did you go in the shed?

THE WITNESS: I didn't see any shed. No, I didn't see any shed.

BY MR. FLANNERY:

Q. After the shots were fired, did the policemen arrive? A. Yes, they shined the light over the fence into my face and told me not to move.

Q. When the policeman shone his light over the fence, Lee Bong was holding the revolver on you, wasn't he? A. He was just standing there holding the revolver.

Q. And he was very excited, wasn't he? A. It just seemed like he was astonished that the police came, that is the way it seemed to me.

Q. His arm was shaking when he held the revolver? A. I didn't notice him shaking.

Q. Then there came a time when the policeman came into the back yard and placed you under arrest; isn't that right? A. Yes.

Q. As a matter of fact, one of the policemen held a revolver down on you with his flashlight while the other officer was admitted by Lee Bong. Isn't that right? A. That's right.

Q. Now, Lee Bong was shouting, wasn't he, when the policemen came to the wall and looked over? A. Lee Bong wasn't saying anything. He was just
97 standing there with the pistol on me, and the police say, "Lee, go around, open the door." He wasn't saying anything. He was just standing there. He wasn't saying anything.

Q. Was Lee Bong shouting at you, "You robbed. You robbed me?" A. No, Lee Bong wasn't saying anything.

Q. You deny that. Now, then, after the policemen came into the back yard, didn't Lee Bong tell the policemen in your presence that you had robbed him? A. No.

Q. He did not? A. No.

Q. Did Lee Bong ever say in your presence that you had robbed him? A. No. I didn't hear him.

Q. You didn't hear him? A. No, not in my presence.

Q. Did you ever admit that you had robbed Lee Bong? A. No, I never said I had robbed Lee Bong.

Q. You denied it all the time to the police? A. I told them even when they was beating me up, I told them, "Just have it your way." I said, " I can't fight
98 the police." I never admitted I robbed him. I said "Have it your way."

Q. After the police took you and put you under arrest, they took you inside the restaurant, didn't they? A. Yes.

Q. Then one policeman, Officer Dwyer, went into the back yard, didn't he, he left the room? A. I don't know where he went.

Q. But when he came back he had a wallet with him, didn't he? A. Yes, he had a wallet with him when he came back.

Q. Now, before the officer came back with the wallet, Lee Bong had accused you of robbing him, hadn't he? A. I didn't hear, him. Him and Lee Bong was in

the kitchen talking. I don't know what was said in there. I was as far as from here to the back of the courtroom, I guess. They were in the kitchen talking. I could hear them talking, but couldn't hear what was said.

Q. Did Lee Bong ever come up to you and say you robbed him? A. No, he never said I robbed him.

Q. When the officer came back with the wallet, he asked you again, wasn't it a fact, did you rob Lee Bong, did he not? A. No, he told me I robbed him.

99 Q. He had the wallet with him at that time, didn't he? A. Yes, he was counting the money.

Q. And at that time didn't you say, "Well, what Lee Bong says is true, I did rob him?" A. No, I didn't say that.

Q. You never said that? A. No.

Q. Now, then, you testified that the officers beat you up, is that correct? A. Yes, they did.

Q. Now, when did that happen, before the officer came back with the wallet or after the officer came back? A. After they came back.

Q. After they came back, after the officer came back with the wallet, how long was it before someone hit you, according to you? A. When he came through the kitchen, when he came out of the kitchen he had the wallet in his hand. He said, "I thought you didn't take this wallet?" About that time one kicked me, and he hit me as he walked up on me.

Q. Wait a minute: Officer Dwyer, please stand. Is that the officer that came back with the wallet? A. Yes, that's him. The old one was holding me

100 in the restaurant.

Q. Now, this officer standing -- and for the record, that is Officer Dwyer -- did he hit you? A. Yes, he did.

Q. Where did he hit you? A. He hit me up here aside of the head, and face.

Q. What? A. Aside of the head and face.

Q. How many times did Officer Dwyer hit you? A. I don't know. Several times.

Q. Can you be more specific? Was it two, three, four, five times or more? A. Five or six times or more.

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101 Q. Who kicked you? A. The other one, the older one.

Q. All right. For the record, Officer Harned, will you stand up, please? Is it your testimony that Officer Harned, the officer now standing in the courtroom, is the one that kicked you? A. Yes, sir, that's right.

Q. How many times did Officer Harned kick you? A. I would say about four times, maybe.

Q. Four times? A. Something like that.

Q. Where did Officer Harned kick you? On what part of your body? A. The shins, legs, and knee.

Q. Shins, knees and legs? A. I had a scar on my knees.

Q. You have a scar? A. I had one. I don't know if it is there now. No, I don't think it is there now.

Q. Did Officer Harned hit you with his fist in addition to kicking you? A. No, he didn't hit me with his fist, no.

102 Q. Did this beating take place in Lee's Restaurant or in the back yard? A. In Lee's Restaurant, inside.

Q. Did Officer Dwyer ever kick you? A. The younger one, no, no. No, he didn't kick me.

Q. Now, how long did the beating take, how many minutes? A. I don't know. I couldn't say to be exact.

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THE WITNESS: I would say about three minutes, maybe.

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Q. Now, after that, did you admit that you had robbed Lee Bong? A. No, I didn't.

Q. You still denied it? A. After that I told them O.K., have it your way.

Q. Did you say anything else in addition to "O.K., have it your way?" A. No. I told them, I said, " You are going to have your way anyway, have it your

way." He said, "Don't tell me that any more," so I didn't say anything.

103 Q. At that point did you say, "What Lee Bong says is true?" A. No, I didn't say that.

Q. Did you admit at that point that you had hidden in the lavatory waiting for the place to close up so that you could take anything? A. No, that's what they told me.

Q. Did you tell that to them after the beating that you claime d? A. No, they told me that.

Q. Did you ever admit to the police that you had taken the wallet and that you had in fact thrown it in the trash can? A. No.

Q. You deny, then, that you ever made any confession in this case? A. Yes, I did n't make any kind of confession to them that I took Mr. Bong's wallet. I told them, "Have it your way," if that is a confession.

Q. There came a time when you went to No. 2 precinct? A. Yes.

Q. Did anyone beat you up there? A. Yes, the police did. I don't know whether it was No. 2 or not.

104 Q. Who? A. No, they took me to the police. I am not familiar with the station.

Q. When you arrived at the police station, did someone beat you down there? A. No.

Q. Then the only beating you received was at this restaurant? A. Yes, that's right.

Q. Did you complain to anyone at No. 2 when you arrived there that you had been beaten? A. Wasn't nobody to complain to.

THE COURT: Just answer the question.

THE WITNESS: No.

BY MR. FLANNERY:

Q. You did not? A. No.

Q. The next day you were brought to Court, before a Judge, to be arraigned? A. Yes.

Q. You were brought before a Judge. Did you tell the Judge the next day

that the police had beaten you? A. No.

105 Q. Did you complain to anyone the next day that the police had beaten you? A. I told two officers that brought me down from where -- on the way to the police station, two officers brought me to the police station -- I told them.

Q. What were their names? A. I don't know.

Q. Were they Officers Dwyer and Harned? A. No, they were two colored officers.

Q. Two colored policemen? A. Yes.

Q. They brought you from No. 2 precinct to Court the next day? A. No, they brought me from Lee Bong's place to police headquarters.

Q. On that same night? A. Yes.

Q. And you don't know their names? A. No.

Q. And what did you tell the two colored officers who took you from Lee Bong's to No. 2 precinct? A. I just told them the guys beat me up and asked them were they going to beat me up too.

Q. What? A. I told them they beat me up and asked them if they were

106 going to beat me up too. They said, "No, we just believe in letting a fellow get it in Court. We don't believe in hitting them like that."

Q. Were those two colored officers in uniform? A. Yes, they were.

Q. Were they the officers operating the patrol wagon? A. No, they had a car.

Q. You were taken to No. 2 precinct in a scout car, were you? A. Yes.

Q. All right. Now, did you complain to anyone else that you had been beaten? A. No.

Q. When you went over to jail, did you see a doctor over there? A. No, I was locked up. No, I didn't.

Q. When they admitted you into jail, did you get a physical examination before you were admitted? A. No.

Q. Have you ever seen a doctor over at the jail? A. No.

107 Q. Did you talk to a classification officer at the jail? A. No, I didn't talk

to anybody but the officers that questioned me.

Q. When you got to jail didn't someone interview you before you were put in a certain part of the jail? Did you have to fill out some papers and sign your name? A. Yes.

Q. Did you tell that person or those people who interviewed you that you had been beaten? A. Well, the ones that interviewed me were the ones that beat me up.

Q. At the jail? A. Yes.

Q. I am not talking about the police precinct now. I am talking about the jail over on 19th Street, remember, when you went there the next day. A. Oh, at the jail, oh, no, no.

Q. You didn't tell anyone over there? A. No.

Q. When you got over to the jail on 19th Street, you have seen a doctor over there, haven't you? A. No, I haven't seen a doctor.

Q. Well, did you receive some injuries as a result of this beating you
108 claimed? A. I was just sore and stiff. I mean, my leg was stiff. That's about all. My mouth was sore inside. That's all.

Q. You claimed you were hit four, five or six times about the face; is that right? A. Yes, aside the head, like that (indicating).

Q. Did you get a black eye? A. No.

Q. Any teeth knocked out? A. No. I just got cut up inside my mouth a little bit, that's all.

Q. But you never requested any treatment for any injuries you received, did you? A. No, I didn't.

Q. And you made no complaints to anyone about this beating except you say, the two colored police officers who took you from Lee Bong's restaurant to No. 2 precinct shortly after your arrest? A. Yes, sir.

* * * * * * * * *

109 WILLIAM A. HARNED

* * * * * * * * *

DIRECT EXAMINATION

* * * * * * * * *

Q. Officer Harned, after Officer Dwyer came back into Lee's Restaurant with the wallet in his possession, did there come a time during the questioning of this witness that you kicked him? A. No, sir.

Q. On the legs, four or five times? A. No, sir.

110 Q. Did you ever use any physical violence of any type on this defendant? A. No, sir.

Q. On that day, January 25th? A. No, sir.

Q. Did you see Officer Dwyer strike the defendant? A. No, sir.

Q. Five or six or more times, about the face? A. No, sir.

Q. Did you see any physical violence whatsoever used upon the person of the defendant McQueen on January 25th? A. No, sir.

* * * * * * * * *

CROSS EXAMINATION

* * * * * * * * *

Q. Who were the officers that took the defendant from your custody to the police precinct? A. I believe it was Melvin Bright and Rodney Turner. I am not sure. They are the regular men in 23 scout. There may have been a relief man for one of them. I am pretty sure Melvin Bright was one of the regular men. He was there.

111 Q. Who was the other one? A. Rodney Turner.

* * * * * * * * *

THOMAS G. DWYER

* * * * * * * * *

DIRECT EXAMINATION

* * * * * * * * *

Q. Officer Dwyer, after you re-entered Lee's Restaurant with the wallet as you have previously testified, did there come a time during the questioning of the defendant McQueen when you struck him about the face four or five or six times or more with your fist? A. No.

Q. Did you ever strike this defendant? A. No, sir.

Q. Did anyone else ever assault the defendant in your presence? A. No, sir.

112 Q. Did you ever see Officer Harned kick the defendant four or five times about the legs? A. No, sir.

* * * * * * * * *

115 (In Open Court):

THE COURT: Ladies and gentlemen of the jury, counsel have stipulated that the Court advise you that the reason that Lee Bong, who was the man alleged to have been robbed in this case, is not present as a witness or has not been presented as a witness is because he has passed away, that is, he has died since the commission of the offense and consequently is not available as a witness. But the attorneys agreed you should be advised of this fact so you would know why this otherwise most important witness was not in the court room to testify before you.

* * * * * * * * *

127 CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, it is now the Court's responsiblity to instruct you upon the law that will govern you in reaching your verdict in this case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court.

When you retire to your jury room, you will take with you a copy of the indictment returned by the Grand Jury in this case. Remember that the indictment is not evidence against this defendant. Remember that this sheet of paper which you will have in the jury room is not entitled to any probative value, that it is not entitled to evidenciary value. The only purpose of the indictment is to inform this defendant of the charge preferred against him, the charge which he must answer when he comes into court.

The indictment in this case is a very short one. It charges the count of robbery in the following words:

"That on or about January 25, 1958, within the District of Columbia, Harold I. McQueen" -- that is this defendant -- "by force and violence, and against resistance, by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession

of Lee Bong, property of Lee Bong of the value of about $29.00, consisting of the following: One wallet of the value of $1.00 and $28.00 in money."

128 The crime of robbery in the District of Columbia is defined by our Criminal Code, as follows:

"Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear shall take from the person or immediate actual possession of another anything of value" shall be guilty of the crime of robbery.

There are three separate elements necessary to constitute the crime of robbery: The first element is the use of force or violence, or the use of means whereby the complaining witness was put in fear, or a sudden or stealthy taking or snatching. The second element of the crime of robbery is a taking from the person or immediate actual possession of another any money or other personal property. And the third element, of course, is the intent to rob or steal.

The law is in this case, as it is in every other case in which you participate that the defendant is presumed to be innocent. As I have explained I believe to all of you now, this means the defendant is not required to prove his innocence, but rather the Government is required to prove his guilt and to prove it beyond a reasonable doubt. The presumption of innocence is a unique provision of the

129 Anglo-American system of jurisprudence, because it is not a doctrine that is recognized in a majority of the countries of the world. In various European countries, when a person is charged with a crime, he is told in effect, "If you are innocent, go ahead and prove it." What is the significance of the doctrine of presumption of innocence? In this country, the defendant is presumed to be innocent. He has no burden of proving his innocence; rather the Government has the burden of proving the defendant guilty beyond a reasonable doubt. This means unless the Government, in this case and in every case, sustains the burden of proof and proves to your satisfaction beyond a reasonable doubt that this defendant committed all the elements of crime with which he is charged, then you must find the defendant not guilty.

As I said to you a moment ago, the burden of proof is upon the Government

to prove the defendant guilty beyond a reasonable doubt. This does not mean beyond all doubt whatsoever. In other words, the Government must prove the defendant guilty to a reasonable certainty, but not to an absolute certainty or mathematical certainty. As its name implies, a reasonable doubt is a doubt predicated upon reason, a doubt which when you are considering it you can give a reason for its existence.

Proof beyond a reasonable in a final analysis means simply this: If, after
130 a fair and impartial comparison of all of the evidence in this case, including the evidence offered by the defendant, you can truthfully say to yourselves you are not convinced of the defendant's guilt, then you have a reasonable doubt and your verdict should be not guilty. But, if after you make this fair and impartial comparison and consideration of all of the evidence in this case, you can truthfully say to yourselves that you have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in the more weighty and important matters in the course of your own daily lives, then you have no reasonable doubt and your verdict should be guilty.

In determining whether the Government has established the charge against the defendant, you must consider and weigh the testimony of all of the witnesses who have appeared before you. This includes the testimony of the witnesses offered by the Government and the testimony of the defendant acting as witness in his own behalf.

You are the sole judges of the credibility of the witnesses. This means you must determine which of these people you are going to believe and to what extent you are going to believe them. I think the only basic problem in this case is your determination as to which of the witnesses you are going to believe, because the testimony of the Government's witnesses and the defendant's
131 testimony places before you two sets of facts, and you must accept one or the other of those facts.

In determining how much credence you will give to the testimony of each of these witnesses, you may consider the demeanor of the witnesses on the witness stand, whether the witness impresses you as a truth-telling individual,

also whether the witness appears to have an accurate memory and recollection of the facts about which he is testifying, whether the witness has any interest in the outcome of the case, whether the witness displays any prejudice or favoritism towards the Government or towards the defendant. You may also consider any other factor or element which you would consider in reaching your day-to-day decisions as to whether people are telling you the truth or are telling a falsehood.

If you believe any witness wilfully testified falsely as to any material fact concerning which fact that witness could not possibly be mistaken, you are then at liberty, if you desire to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

You are further instructed that, while the law makes this defendant a competent witness in his own behalf, you have the right to consider his situation, all the circumstances which surround him, his interest in the result of your verdict, and you should give to his testimony such credibility as you believe it is fairly entitled to receive.

132 There are two or three elements that have entered in the evidence of this case. The first is the matter of intoxication about which counsel for both the Government and the defendant have commented. Remember that the statements of the attorneys do not constitute evidence in the case; nor does any statement that the Court makes about the evidence constitute evidence in the case.

In reaching your verdict, you must be guided by the testimony of the witnesses who took the witness stand, plus the stipulation which the Court advised you about, and plus one exhibit which the Court has admitted into evidence.

Intoxication: What is its significance in the present case? From your viewpoint, the matter of intoxication is of no probative value except insofar as it affects the testimony of the defendant as a witness. It is an axiom of the law, intoxication is generally no defense for the commission of a crime unless the crime is of such a nature that it requires a specific intent, in which event intoxication is a proper and legal defense if the jury finds as a matter of fact the defendant was so intoxicated that he did not know what he was doing and,

consequently, could not have the necessary intent. This matter of intoxication is important to the jury only when the defendant says, "Yes, I did this, I was intoxicated; but I shouldn't be held liable for it." In this case, the defendant
133 denies perpetration of the offense, so the element of intoxication is not offered as a defense.

Similar observations relate to the testimony of the defendant that he was struck and kicked by the police officers. These statements are of value to you only insofar as they affect the credibility of this defendant as a witness and insofar as they affect the testimony of Officers Harned and Dwyer.

There are circumstances in which the jury must be vitally concerned as to whether a defendant was or was not struck by the police officers. These cases arise when the defendant makes a statement or an admission that he made a confession only because the officers beat him and forced him to make the confession. In cases of that kind, the jury must determine, first, whether the defendant was so beaten and, second, whether the statement made was voluntary or involuntary. In this case, the defendant does not say to you, "I confessed to that because I was beaten." He says, "Although I was beaten, I never admitted commission of the crime. I, at no time admitted the perpetration of the crime." The defendant has denied he ever made any statement and this, consequently, places upon you only the responsibility of exercising your prerogative to determine who is telling the truth in this situation; as to whether the defendant did or did not admit the crime.

134 You are the sole, the exclusive judges of the facts in this case. This means you must decide whether you believe the Government's witnesses or whether you believe the defendant. You are admonished not to permit your judgment, your intelligence or your reason to be swayed by prejudice, bias, ill-will or sympathy. Your verdict is to be reached in accordance with the solemn oath you took that you would well and truly try this case and a true verdict render in accordance with the evidence, and in accordance with the law as it is outlined to you by the Court.

Your verdict in this case may be guilty or not guilty. There is a single

count in the indictment, consequently, you just return a verdict of guilty or not guilty. Of course, your verdict must be a unanimous one, that means that all twelve of the jurors must concur in the verdict.

Will counsel come to the bench.

(At the Bench:)

THE COURT: Does the Government request any further charges, Mr. Flannery?

MR. FLANNERY: No, Your Honor.

THE COURT: Do you have any objection to the charges given?

135 MR. FLANNERY: No, Your Honor.

THE COURT: Mr. Bartle, do you request any further charges?

MR. BARTLE: No, Your Honor.

THE COURT: Do you have any objection to the charges given?

MR. BARTLE: No, Your Honor.

* * * * * * * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14598

HAROLD I. McQUEEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

CARL W. BELCHER,
THOMAS A. FLANNERY,
Assistant United States Attorneys.

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United States Court of Appeals
For the
District of Columbia Circuit
FILED OCT 21 1958
Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

Where two police officers, attracted by gun shots, went to the back yard of a restaurant at 3 a. m. and observed the excited and frightened victim of a robbery holding a gun on appellant and shouting: "You robbed me"; the victim immediately recited facts of the robbery to the officers; the victim's stolen wallet was recovered in the vicinity where appellant was first seen; appellant then promptly admitted the crime; and, the victim died of a heart attack four hours after the crime; in the opinion of the appellee the following questions are presented:

1. Was there substantial, independent evidence which corroborated the confession?

2. Were the victim's outcries and his statement given to the police at the scene of the crime spontaneous utterances and therefore admissible under either of two exceptions to the hearsay rule:

   A. Spontaneous declarations of the victim?

   B. Admissions of the appellant, based upon adoption by him of the statements by the victim?

3. Was the victim's wallet sufficiently identified as such before being introduced into evidence?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14598

HAROLD I. McQUEEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On March 10, 1958, there was filed in the District Court a one count indictment charging that on or about January 25, 1958, Harold I. McQueen robbed one Lee Bong of some $28.00 in money and a wallet, in violation of 22 D. C. Code, § 2901 (R. 137). A jury found him guilty as indicted (R. 144). By judgment filed May 16, 1958, a sentence to imprisonment for a term of two to six years was imposed (R. 148–50). This appeal was timely noted (R. 151).

On January 25, 1958, Officers Thomas G. Dwyer and William A. Harned, members of the Metropolitan Police Force, were patrolling their beat at about 3:10 a. m. in the vicinity of 14th and P Streets NW in the District of Columbia when they heard the sound of three pistol shots (R. 5, 6). They immediately rushed to the place from which the sound of the shots seemed to emanate (R. 61). Upon climbing a wall they looked into the back yard of 1504 14th Street and saw Lee Bong, the

owner of Lee's Restaurant, holding a gun and shouting "You robbed me; you robbed me" (R. 7).

At this point appellant was observed coming out of a utility shed in the back yard (R. 7). While Officer Harned held his revolver on appellant, Officer Dwyer was admitted through the front door of the restaurant by Lee Bong (R. 8). Lee Bong at this time appeared to be very nervous and was trembling with fright (R. 8, 9). Appellant was taken into custody by Officer Harned and Officer Dwyer went to the back yard and searched for a wallet which Lee Bong stated had been stolen from him by appellant (R. 9). Officer Dwyer discovered a wallet in a trash can, which was beside the shed from which appellant had been seen to come by the officers (R. 12). When first arrested appellant had denied taking Lee Bong's wallet, but when Officer Dwyer recovered the wallet and showed it to him appellant admitted he had taken the wallet from Lee Bong (R. 14, 18). Appellant further admitted that he had hidden in the ladies' room of the restaurant until after closing time and that he had planned to steal something from the restaurant after it had been closed (R. 14), but that Lee Bong had discovered him hiding and that he then took Lee Bong's wallet and ran out the back door (R. 15).

In the presence of appellant, Lee Bong related that while locking his restaurant he discovered appellant hiding in the ladies' room and that appellant hit him with a beer bottle, knocked him down, took his wallet from Bong's pocket, and ran out the back door. The victim then stated he secured a gun and pursued appellant into the back yard. Lee Bong identified the wallet recovered by Officer Dwyer as his wallet (R. 15). Lee Bong was very nervous, excited, and frightened during the time the police talked to him (R. 42, 43). Appellant was then taken to a police precinct, arriving there about 3:25 a. m., fifteen minutes after his apprehension (R. 51). Officer Dwyer testified that at 3:30 a. m. at the precinct in the course of the booking procedure, appellant again admitted the crime (R. 52).[1]

The victim Lee Bong was taken to a hospital and died at 7:30 a. m. the same day (R. 46, 115).

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[1] The testimony of Officer Dwyer related above was corroborated by Officer Harned (R. 60-68).

During the trial appellant protested that the wallet which had been recovered by Officer Dwyer had not been sufficiently identified (R. 10). The Court then excused the jury and a hearing was held out of the presence of the jury to determine the circumstances surrounding the recovery and identification of the wallet. Officer Dwyer testified how he had found the wallet in a trash can in the back yard and stated that he identified it by two cuts he had put on it (R. 12, 13). Officer Dwyer then stated that he showed the wallet to appellant who admitted that he had taken it (R. 14). Officer Dwyer stated that Lee Bong also identified the wallet as belonging to him (R. 15). The Court held that the wallet had been sufficiently identified and admitted it into evidence as Government Exhibit No. 1.

Appellant objected to the admission into evidence of Lee Bong's statements to the police on the grounds that they were hearsay (R. 26–29). The Court after hearing testimony from Officer Dwyer as to Lee Bong's condition at the time he made his statement ruled that the statements were spontaneous utterances and were admissible in evidence as exceptions to the hearsay rule (R. 42–47).

Appellant denied that he had robbed the victim and also denied that he had given a confession to the police. He testified that the police had beaten him (R. 75–86). He also denied he had been in the shed in the back yard or that Lee Bong had accused him of robbery (R. 86, 97). This appeal followed.

STATUTE INVOLVED

Title 22, District of Columbia Code (1951), Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

Appellant's confession was corroborated by substantial independent evidence. The victim's accusations made in the presence of appellant were admissible under two theories: (a) they were spontaneous utterances and therefore admissible as an exception to the hearsay rule; and (b) they were adopted by the appellant and were properly admissible as admissions of the appellant. Appellant's claim that the wallet was not properly identified is without merit since both the victim and appellant identified it and the officer identified it in court by certain identifying marks he had placed on it.

ARGUMENT

I

There was substantial independent evidence corroborating appellant's confession

Two police officers testified that within a few minutes after his arrest, while still at the scene of the crime, appellant confessed the crime to them in the presence of the victim (R. 14, 15, 18, 48, 49). Appellant contends that there was insufficient corroborative evidence to support the jury's verdict. This argument is clearly without merit.

Corroborative evidence need not be sufficient, independent of a confession, to establish the corpus delecti. In *Opper* v. *United States*, 348 U. S. 84, 93, 75 S. Ct. 158, 99 L. Ed. 101, 198, 109 (1954), the Supreme Court held:

> However, we think the better rule to be that the *corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delecti.* It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. * * * *It is sufficient if the corroboration supports the essential facts admitted*

> *sufficiently to justify a jury inference of their truth.* Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt. (Emphasis supplied.)

And in *Smith* v. *United States*, 348 U. S. 147, 156, 75 S. Ct. 194, 99 L. Ed. 192, 200 (1954), the Court said:

> There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the *corroborative evidence does not have to prove the offense beyond a reasonable doubt*, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. * * * In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone * * *, and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charges. * * * We answer both in the affirmative. *All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused.* (Emphasis supplied.)

These tests are applicable to the instant appeal.

Viewing the instant case in the light of the principles enunciated by the Supreme Court in the *Opper* and *Smith* cases, it is apparent that there was ample independent evidence to corroborate the confession of appellant. Even disregarding for the moment the accusatory statements made by Lee Bong in the presence of appellant (discussed in II, *post*) it will be seen that the jury had before it evidence to the effect that: (1) that the police officers heard three shots at 3 a. m. in the morning; (2) that almost immediately thereafter they saw

Lee Bong, the victim, standing in the back yard of his restaurant holding a gun; (3) that Lee Bong was excited, nervous, trembling, frightened, and that his speech was incoherent (R. 42, 43, 44); (4) that they saw appellant emerge from a shed in the back yard of the restaurant; (5) that there was blood on Lee Bong's hand (R. 45, 46); (6) that the victim's wallet was recovered from a trash can in the yard where appellant was first seen by the police officers; (7) and that the wallet had $28.00 in it.

All of the above enumerated circumstances were testified to independently of the confession and obviously corroborated the confession. Standing alone, without the confession, it could well be argued that they were sufficient to prove that a robbery had recently been committed and that appellant committed it. When the accusatory statements of the now deceased victim are added to the enumerated circumstances, the corroboration becomes overwhelming.

It is therefore clear that appellant's confession was corroborated in accordance with the requirements laid down by the Supreme Court, and that the confession, plus the corroborating circumstances, were sufficient to prove his guilt beyond a reasonable doubt.

II

The deceased robbery victim's outcries and statements were admissible as exceptions to the hearsay rule

The two police officers testified that the first words they heard when they looked down over the fence in the backyard of the restaurant were the victim's cries "You robbed me. You robbed me" (R. 7). In addition, they testified that Lee Bong, who died four hours after the crime, made further accusatory statements in the presence of appellant at the scene of the crime and shortly after appellant had been apprehended (R. 7, 14, 15, 42, 43, 44, 50, 51, 52). Appellant admitted the truth of the accusatory statements at the time they were made (R. 14, 15). Appellant argues these matters were inadmissible hearsay (Br. p. 8).

Declarations and statements made by a person after the commission of an offense are admissible in evidence as part of the *res gestae* when they are made at such time and place

and under such circumstances as to exclude the idea of design, premeditation or fabrication, and as to indicate that they were spontaneous expressions of a state of mind created by the act charged. *Guthrie* v. *United States,* 92 U. S. App. D. C. 361, 207 F. 2d 19 (1953). In the instant case the trial court heard testimony outside the presence of the jury to the effect that the victim, Lee Bong, was greatly upset and shocked by the robbery; that he was excited, nervous, and trembling with fright (R. 42–47). On the basis of conditions and circumstances testified to, the court held that the accusatory declarations were spontaneous utterances within the exception of the hearsay rule, and permitted the testimony to go to the jury. This exercise of judicial discretion should not be disturbed on appeal except for a most compelling reason not present in this case. *Guthrie* v. *United States, supra,* 92 U. S. App. D. C. at 365.

It would be difficult to imagine declarations more clearly spontaneous than the overheard outcries "You robbed me. You robbed me."[2] It is submitted that the additional accusatory statements and narrative account given by the victim a few minutes later were equally spontaneous and were properly admitted. (In *Guthrie* v. *United States, supra,* this Court held that a statement given by the victim of an assault approximately eleven hours after the incident was properly admitted as a spontaneous utterance. See also *Lampe* v. *United States,* 97 U. S. App. D. C. 160, 229 F. 2d 43 (1956); *Wheeler* v. *United States,* 89 U. S. App. D. C. 143, 211 F. 2d 19 (1952); *Beausoliel* v. *United States,* 71 U. S. App. D. C. 111, 107 F. 2d 292 (1939)).

Even if the statements of Lee Bong are not held to be spontaneous utterances, they would still be admissible as exceptions to the hearsay rule in that they were accusatory in nature, were made in the presence of the third-party witness and were then adopted[3] by appellant. *Kelley* v. *United States,* 99 U. S.

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[2] For analogus situations in state court see, for example, *Goon Bow et al.* v. *People,* 160 Ill. 438, 43 N. E. 593 (1896); *State* v. *Smith,* 26 Wash. 354, 67 Pac. 70 (1901); *State* v. *Driscoll,* 72 Iowa 583, 34 N. W. 428 (1887); *People* v. *Todaro,* 256 Mich. 427, 240 N. W. 90 (1932); *Solice* v. *State,* 21 Ariz. 592, 193 Pac. 19 (1920).

[3] R. 14, 48–52.

App. D. C. 13, 236 F. 2d 746 (1956). Under either of these two exceptions to the hearsay rules, the testimony was properly admitted in evidence.

III

The victim's wallet was properly identified introduced into evidence

Under the facts disclosed by the testimony appellant's contention that the trial court committed error in admitting Government Exhibit No. 1, the wallet, into evidence, is without merit. There was testimony by Officer Dwyer that after he recovered the wallet containing $28.00 he put two marks on it (R. 13). He identified the wallet by these two marks. There was also testimony to the effect that appellant, upon being shown the wallet, admitted that he had taken it from Lee Bong (R. 14, 18, 23, 48, 49, 52). Lee Bong also identified the wallet in the presence of the defendant and the officers (R. 15). Clearly appellant's claim that the wallet was not properly identified is without merit.

CONCLUSION

Wherefore, it is respectfully submitted the judgment of the District Court be affirmed.

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